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91-932

Supreme Court, U.S.
FILED
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No.: _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDNAR LOUISE JAMES,

PETITIONER

v.

SUBSEQUENT INJURY TRUST FUND,

ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF GEORGIA

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QUESTION PRESENTED

Where state law provides a lump sum or periodic disbursement of a workers' compensation award, does a "paper hearing" satisfy procedural due process when an oral hearing is requested on the lump sum disbursement?

LIST OF PARTIES

Ednar Louise James,	Petitioner
Subsequent Injury Trust Fund,	Respondent
Central State Hospital, State of Georgia	Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDNAR LOUISE JAMES,

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v.

SUBSEQUENT INJURY TRUST FUND,

ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

W.B. Bradley, on behalf of Ednar Louise James petitions for a writ of certiorari to review the decision of the Supreme Court of the State of Georgia.

OPINIONS BELOW

The opinion of the Georgia Supreme Court (App. A, infra, 1a-6a) is reported at 261 Ga. 548, 406 SE 2d 77 (1991). The opinion of the Superior Court of Baldwin County (App. B, infra, 7a-14a) is not reported. The opinion of the State Board of Workers' Compensation (App. C, infra, 15a-16a) is not reported.

JURISDICTION

The decision of the Georgia Supreme Court (App. A, infra, 1a-6a) was entered on July 3, 1991. A petition for rehearing (App. D, infra, 17a-18a) was denied September 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall...be deprived of ...property, without due process of law..."

2. Section 8 of the Georgia Workers' Compensation Act, Ga. Law 1978, p. 2220, 2226 codified as Official Code of Georgia Annotated (O.C.G.A.) 34-9-222(a) provides:

> "Upon the application of any party when benefits have been continued for a period of not less than 26 weeks, if the board determines that it is for the best interest of the claimant to prevent extreme hardship or is essential to the rehabilitation of the claimant, the

board may order that the liability of the employer for future income benefits be discharged by the payment of a lump sum equal to the sum of all future payments reduced to their present cash value upon the basis of interest calculated at 7 percent per annum." [Emphasis Added]

3. Rules and Regulations of the State Board of Workers' Compensation, State of Georgia, Rule 222, (effective July 1, 1989) (App. F, infra, 21a-26a)

STATEMENT

The Georgia Workers' Compensation Act, Georgia Law 1978, p. 2220, 2226, codified as O.C.G.A. 34-9-222(a) provides for the disbursement of a workers' compensation award in a lump sum payment

or in periodic payments. Where the payment of a lump sum will "prevent extreme hardship" upon the injured employee or the lump sum payment is "essential to rehabilitation" of the employee, the State Board of Workers' Compensation may order that the liability of the employer for all future income benefits be paid in a lump sum.

The petitioner timely filed an application for a lump sum and specifically requested an oral hearing for a lump sum payment to prevent "extreme hardship" or as "essential to rehabilitation." The State Board of Workers' Compensation denied an oral hearing. The case was decided on the petitioner's application and responding documents. Without a finding of fact or conclusion of law, the State Board of

Workers' Compensation stated, "...[P]ayment of a lump sum advance is not in the best interest of the employee." (Appendix C, infra, p. 15a-16a)

The case was appealed to the Superior Court of Baldwin County, Georgia, which held the petitioner was entitled to an evidentiary hearing on the application for a lump sum payment. (App. B, infra, 7a-14a) An appeal was filed with the Georgia Court of Appeals which transfered the case to the Georgia Supreme Court. (Appendix E, infra, p.19a-20a).

The Georgia Supreme Court held that a "paper hearing" was sufficient to protect the procedural due process rights of the petitioner. The court relied upon the three prong test of Mathews v.

Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) requiring an evaluation of (1) the private interest effected; (2) the possibility of erroneous deprivation using the established procedural and probable value of additional procedural safeguards; and (3) the government's interest in the procedure or the burden of providing greater procedural protections.

Petitioner made a written request for an evidentiary hearing to the court of first instance (State Board of Workers' Compensation). At the first stage of the appeal (Baldwin County Superior Court), the petitioner raised the issue of deprivation of property ~~without~~ an evidentiary hearing which denied the petitioner procedural due process. (App. B, infra, 7a-14a)

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the disbursement (periodic payments or lump sum payment) of a citizen's property. The issue addresses the procedural due process necessary for determination of the property disbursement.

Other than the Georgia Supreme Court, it appears that no other court has addressed the constitutionality of affording only a "paper hearing" to an applicant for a lump sum distribution of workers' compensation benefits. In Pearce v. Director, OWCP, 647 F.2d 716 (7th Cir. 1981), the court held that, under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq., and implementing regulations, the deputy commissioner was under a duty

to transfer any claim by a covered employee, including a claim for commutation of workers' compensation payments to a lump sum award, to the chief administrative law judge for a formal hearing. Consequently, the deputy commissioner erred in relying solely on written submissions to make findings and conclusions and to enter an order refusing such commutation. Pearce, 647 F.2d at 724-25. This holding was premised solely upon pertinent statutes and regulations, and not upon constitutional principles. The statutes and rules of the State of Georgia also demand a formal hearing as to the petitioner's claim. (See infra text, p. 14-16)

Other courts have recognized that all parties are constitutionally entitled

to notice and an opportunity to be heard before a lump sum distribution payment is ordered. Independent School District No. 1 of Tulsa County v. Albus, 572 P.2d 554, 561 (Okla. 1977); Todd v. Holt & Vereen Construction Co., 276 S.C. 615, 281 S.E. 2d 215, 216 (1981); 3 A. Larson, The Law of Workmen's Compensation § 82.71 at 15-1241 to 15-1242 (1989). These courts, however, did not address the extent of the hearing required in order to satisfy the mandate of procedural due process.

In general, those federal courts that have addressed the issue have held that a state or federal agency may be required to afford a party a full evidentiary hearing if there are genuine issues of material fact. Altenheim German Home v. Turnock, 902 F.2d 582, 584 (7th Cir. 1990)

Before determining whether there is a genuine issue of material fact (See infra text, p. 15-19), a person must first establish state deprivation of property without due process. There must be established: (1) a property interest; (2) deprivation of the property; and (3) deprivation without due process. Mehta v. Surles, 905 F.2d 595, 598 (2d Cir. 1990)

(I)

Petitioner's property interest is a workers' compensation award and the monetary benefits of that award. Georgia law provides for periodic or lump sum payment of the benefits.

O.C.G.A. § 34-9-222(a) states:

"Upon the application of any party when benefits have been continued for a period of not less than 26

weeks, if the board determines that it is for the best interest of the claimant to prevent extreme hardship or is essential to the rehabilitation of the claimant, the board may order that the liability of the employer for future income benefits be discharged by the payment of a lump sum equal to the sum of all future payments reduced to their present cash value upon the basis of interest calculated at 7 percent per annum." [Emphasis added]

A property interest exists in workers' compensation benefits. Raditch v. U.S., 929 F.2d 478 (9th Cir. 1991) and Auxier v. Woodward - State Hospital School, 266 N.W.2d 139 (1978), Cert. denied 439 U.S. 930.

(II)

Deprivation of petitioner's property was the denial of present payment of future benefits. Deprivation of property can result from the immediate denial of possession of one's property or the denial of future benefits of one's property interest. If future benefits are being denied, the benefits can not be speculative. The benefits of the petitioner were not tentative or speculative. (App. H, infra, 30a)

(III)

The deprivation of petitioner's property interest was without due process. Central to the evaluation of any administrative due process is the nature of the relevant inquiry.

Mathews v. Eldridge, 424 U.S. at 343-344; 96 S.Ct. at 907 (quoting from

Goldberg v. Kelly, 397 U.S. 254, 269) states: "...[A] wide variety of information may be deemed relevant and issues of witness credibility and veracity often are critical to the decision making process. Goldberg noted that in such circumstances, 'written submissions are a wholly unsatisfactory basis for decision.'"

In the present case, the petitioner's application for a lump sum payment must establish "extreme hardship" or "essential to rehabilitation." A lump sum can only be granted if payment is needed to prevent "extreme hardship" or is "essential to rehabilitation." The factual determination of "extreme hardship" or "essential to rehabilitation" would be an evidentiary issue outside the perimeters of a paper

hearing.

Georgia law, O.C.G.A 34-9-222(a), provides the petitioner can have immediate and present possession of her property (the Workers' Compensation benefits as awarded). This immediate lump sum payment and possession is available upon proof of "extreme hardship" or "essential to rehabilitation." The petitioner requested an evidentiary hearing to establish one of the two criteria. The petitioner was allowed no evidentiary hearing. We respectfully submit this was a denial of procedural due process. However, the Georgia Supreme Court held that a "paper hearing" was sufficient.

The criteria for determining the disbursement of petitioner's property is proof of "extreme hardship" or "essential

to rehabilitation." This criteria is very abstract and all encompassing. There may be physical hardships, mental hardships, and financial hardships. Each would be an element of "extreme hardship." The necessity of a lump sum as "essential to rehabilitation" would best be answered by oral testimony of rehabilitation specialists. The criteria of "extreme hardship" and "essential to rehabilitation" can not be established within reasonable means of proof by documentary evidence upon a "paper hearing." The risk of an erroneous deprivation of property would be very probable. Witnesses are essential to establish the "extreme hardship" or "essential to rehabilitation" criteria. The credibility and veracity of a witness can only be determined upon oral

examination in an evidentiary hearing.

- Rule 222(b)(4) of the State Board of Workers' Compensation (App. F, infra, 21a-26a) acknowledges the necessity of a hearing stating: "...In the event of a material and bona fide dispute of fact, the board may schedule a hearing or assign the case to an administrative law judge for the purpose of receiving evidence." [Emphasis added]

The petitioner filed an application. There was a material and bona fide dispute of fact as to "extreme hardship" and "essential to rehabilitation." Therefore, the board could: (1) schedule a hearing or (2) assign the case to an administrative law judge for the purpose of receiving evidence. Neither a hearing nor an assignment was made. A hearing or an assignment for receipt of evidence

were the only options available to the Board. However, the Board denied the application merely as "not in the best interest" of the petitioner. (App. C, infra, 15a-16a)

As stated previously, a genuine issue of material fact may give rise to the necessity of an evidentiary hearing. Altenheim German Home, 902 F.2d at 582 states that "...contested issues of fact turning on questions of credibility that could not rationally be answered without live testimony" require an evidentiary hearing. The criteria "extreme hardship" and "essential to rehabilitation" can not rationally be answered without oral testimony.

The Georgia Supreme Court stated that established procedure allowed petitioner to file all relevant

documents, affidavits, and depositions. The petitioner could have made such filings with an administrative law judge had one been appointed for the receipt of evidence as required by Rule 222. (Rules and Regulations of the State Board of Workers' Compensation, App. F, p. 21a-26a) The petitioner filed an application for lump sum as provided by law with the accompanying documents required by Rule 222. Id. at 21a-26a An evidentiary hearing was requested. The board summarily ruled on the application and denied the hearing and the lump sum.

The decision of the Supreme Court of Georgia (App. A, infra, 1a-6a) acknowledges that upon a proper showing an evidentiary hearing may be necessary to preserve fairness. Nothing would be fairer than to allow the petitioner to

present evidence as to "extreme hardship" and "essential to rehabilitation."

The application of the petitioner (App. G, infra, 27a-29a) requested the lump sum to enable the petitioner to timely pay monthly living expenses; to purchase sufficient food; to obtain her own home; to obtain necessary medical treatment; to pay outstanding medical expenses; and to contribute to the living expenses of the niece's home where petitioner lived.

The petitioner's application made a prima facia showing of "extreme hardship" and the collateral need for a evidentiary hearing to preserve fairness upon the petitioner's claim for a lump sum disbursement of the workers' compensation award.

IV

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, (1976) held that upon termination of a property interest, the court must weigh the following factors: (1) the private interest affected; (2) the possiblity of erroneous deprivation using the established procedure and the probable value of additional procedural safeguards; and (3) the government's interest in the procedure or the burden of providing greater procedural protections.

The petitioner seeks present disbursement of her property upon a lump sum payment. The disbursement of one's property is distinguished from the termination of a property right; however, there remains the similarity of

deprivation of property. The issue as to possession is not "if" but "when."

If this Court applies the Mathews criteria in toto for determining the appropriateness of procedural due process, the petitioner's claim is outside the parameters of Mathews. First, the private interest of the petitioner to have present possession and ownership of her property is a fundamental right of property ownership. Property should not be distributed to the petitioner in piecemeal.

For the petitioner to be denied immediate possession of her property, the full scope of procedural due process should apply; otherwise, the petitioner has been deprived of her property by periodic disbursement.

The petitioner's claim is one of

private interest versus private interest, e.g., the employee versus the employer; the employee versus the insurance company; the employee versus the subsequent injury trust fund.

According to the second prong of the Mathews test, an established procedure which creates a risk of error in the deprivation of ones' property would be unconstitutional.

The risk of erroneous deprivation is of extreme probability considering the proof needed to establish "extreme hardship" or "essential to rehabilitation." Proof of "extreme hardship" or "essential to rehabilitation" is not a litmus paper test. Reliance upon a "paper hearing" is not sufficient. See supra text, p. 13-15.

As to the governmental interest, the property to be disbursed is that of two private entities with the disbursement controlled by a governmental entity (State Board of Workers' Compensation). There is presently established an administrative agency (State Board of Workers' Compensation) for evidentiary hearings. The fiscal and administrative burden of the State of Georgia in allowing an evidentiary hearing would be minimal.

Where a private property interest is adverse to another private property interest, the cost to government in determining the ownership or disbursement of property should be of minimum consideration.

The termination cases of Mathews and its progeny provide for a preliminary

hearing and a post-termination hearing; the procedure in the case sub judice provides for only one hearing. The petitioner was denied that one hearing.

Neither the State Board of Workers' Compensation nor the Georgia Supreme Court made a detailed analysis of the Mathews criteria. For the petitioner it is not merely a potential injury from interrupted receipt of a source of income pending a final administrative decision as in Mathews. Conversely, the issue is disbursement of one's property interest without due process.

In some circumstances, property interest can be terminated [or disbursed] after minimal interaction between the claimant and the government as long as appropriate post-termination evidentiary hearings are provided. Raditch v. U.S.,

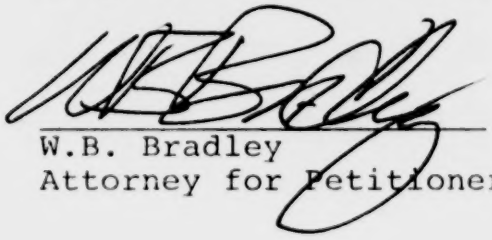
929 F.2d at 480 Petitioner was allowed no preliminary or subsequent evidentiary hearing. The only hearing allowable for protection of the petitioner's property interest was denied.

In summary, state law allows immediate possession of future workers' compensation benefits where payment of the lump sum will prevent "extreme hardship" or is "essential to rehabilitation." Factual proof of this criteria is beyond the scope of a "paper hearing." Witnesses are needed to established the required criteria. There were genuine issues of material fact as to the criteria. The risk of erroneous deprivation is very probable. Denial of a formal evidentiary hearing was denial of procedural due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

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In the Supreme Court of Georgia

Decided: July 3, 1991

S91A0912. SUBSEQUENT INJURY TRUST FUND, et al. v. JAMES.

CLARK, Chief Justice.

Ednar Louise James was injured on the job and awarded $135.00 per week in workers' compensation benefits. Her application for a lump sum payment of her future benefits was denied by the Workers' Compensation Board without an oral hearing. James appealed to the superior court, which held that Board Rule 222(b) and Johnson unconstitutionally deny procedural due process. The employer and insurer appeal.

1. Under Workers' Compensation Board Rule 222(b) and the Court of Appeals case interpreting the rule,

Johnson v. Atlanta Dairies Coop, 172 Ga. App. 403 (323 SE2d 185)(1984), no oral hearing is required before deciding whether to award lump sum workers' compensation benefits. In Johnson, the Court of Appeals held that the board, in its discretion, may either conduct a formal hearing "or may consider the application based on depositions, interrogatories, verified documents, etc... [But,] where necessary to preserve fairness, on a proper showing, the board or ALJ might be required to conduct an evidentiary hearing."

James asserts that due process requires an oral hearing before the lump sum award can be denied. She submits that the federal and state constitutions guarantee notice and hearing as a matter of right where one's property rights are

involved. Blocker v. Blackburn, 228 Ga. 285 (185 SE2d 56)(1971). James is correct that notice and hearing are fundamental to procedural due process. James is not correct, however, in assuming that due process always requires an oral hearing. We conclude that a paper hearing is sufficient to protect the rights at issue here.

Assuming, but not deciding, that James has a protected property interest in a lump sum award of future worker's compensation benefits, due process requires appropriate procedures to safeguard against erroneous deprivation. In deciding what process is due, the court must weigh (1) the private interest affected; (2) the possibility of erroneous deprivation using the established procedure and probable value

of additional procedural safeguards; and (3) the government's interest in the procedure or the burden of providing greater procedural protections. Mathews v. Eldridge, 424 U.S. 319 (96 SC 893, 47 LEd2d 18)(1976).

Here, the private interest at stake is a lump award of future benefits. The denial of a lump sum award does not affect James's right to continuing benefits. The government interest is in avoiding the trouble and expense of an oral hearing. We need not engage is a lengthy discussions of the relative weight of these interests, however, because the established procedure is clearly sufficient to safeguard the claimant's interest and because there is nothing to indicate any probable benefit of an oral hearing. There is no danger

that a claimant will be deprived of any right to a lump sum benefit without notice, because it is the claimant who must initiate the application for a lump sum award. Further, the established procedure allows the claimant to file all relevant documents, affidavits, depositions, etc. that may bear on the determination. Johnson, supra. Although there is no clear advantage to an oral hearing, one may be provided upon a "proper showing" of need or "to preserve fairness." Id.at 404. And, judicial review of the board's decision is available on appeal.

Claimant in this case simply failed to file sufficient documentation with her application to demonstrate a need for the lump sum award or for an oral hearing. We find no constitutional infirmity in the

procedure.

Judgement reversed. All the Justices concur.

IN THE SUPERIOR COURT OF BALDWIN COUNTY

STATE OF GEORGIA

EDNAR JAMES,

Apellant

vs. CIVIL ACTION NO. 90-CV-27079

CENTRAL STATE HOSPITAL,

Appellee

ORDER REVERSING AWARD

The Appellant/Employee was injured on the job and the Appellee/Employer accepted the compensability of the claim. The Employee is presently paid $135.00 per week. The Employee maintains that she is totally disabled and that there is no hope for recovery.

Employee filed with the Workers' Compensation Board an application for a lump sum payment of her benefits pursuant to OCGA § 34-9-222(a). This statute

provides:

> "Upon the application of any party when benefits have been continued for a period of not less than 26 weeks, if the board determines that it is for the best interest of the claimant to prevent extreme hardship or is essential to the rehabilitation of the claimant, the board may order that the liability of the employer for future income benefits be discharged by the payment of a lump sum equal to the sum of all future payments, reduced to their present value upon the basis of interest calculated at 7 percent per annum."

The Employee requested the Board to have a hearing to decide whether she should receive this lump sum award.

Based on Rule 222(b) of the State Board of Workers' Compensation, the Board refused to allow the Employee her requested hearing and denied the Employee a lump sum award.

Employee complains that the Board's decision is contrary to law because the Board failed or refused to schedule a hearing on the application.

Both Employee and Employer agree that Board Rule 222(b) provides that the Board may decide applications for lump sum payments without a hearing. Employer points out that Johnson v. Atlanta Dairies Coop, 172 Ga. App. 403 (1984) held that the Board was not required to have a hearing in order to grant a lump sum award. However, the Court based this opinion on an interpretation of statutes. It did not consider the requirements of

the Georgia and United States Constitutions.

The application for lump sum award obviously concerns the property rights of the Employee and Employer. The Workers' Compensation benefits of a disabled worker often are one of her or his most important, if not paramount, property rights. These benefits drastically affect the economic well-being of the worker. The worker clearly has property interests in the stream of payment of these benefits. Likewise, a lump sum award directly impacts the property rights of the Employer or his insurer.

"Due process of law as guaranteed by the Federal and State Constitutions includes notice and hearing as a matter of right where one's property rights are involved ." Blocker v. Blackburn, 228

Ga. 285, 288 (1971); Sikes v. Pierce, 212 Ga. 567 (1956). Hamilton v. Edwards, 245 Ga. 810, 811 (1980) makes the same statement except it refers to "property interests" in the place of "property rights." "The fundamental idea in 'due process of law' is that of 'notice' and 'hearing'." Blocker, supra at 289. If constitutional due process requires a hearing because of one's property rights in abandoned motor vehicles Gore v. Davis, 243 Ga. 634 (1979), then it surely requires a hearing when the Board determines contested issues about the method of paying a workers' disability benefits.

To be more precise, Johnson v. Atlanta Dairies Coop., supra, does not qualify its holding by stating, "Where necessary to preserve fairness, on a

proper showing, the board or an ALJ might be required to conduct an evidentiary hearing." (Emphasis added.) Id., at 404. It further provides, "... except in extraordinary circumstances, no formal hearing need be held." (Emphasis added.) Id., at 404-05. As previously stated, the court did not explicitly consider the constitutional issues, but this in effect places a burden on an employer or employee to prove that they are entitled to have their constitutional right to a hearing. This is obviously different from, for example, summary judgement proceedings.

The holding in Johnson v. Atlanta Dairies Coop, supra, and Rule 222(b) of the State Board of Workers' Compensation contravene Georgia Constitution of 1983, Article I, Section I, Paragraph I and the

Fourteenth Amendment to the United States Constitution. Therefore, Rule 222(b) is unconstitutional, and the decision of the Workers' Compensation Board is contrary to the fundamental law of our State and our Country. The Board may have statutorily the discretion to deny the Employee's application for a lump sum award, but the Board can only do this constitutionally after a hearing.

As a matter of policy, the Board probably needs to look critically at any application for lump sum award, but this decision is also probably the biggest issue now in the life of the Employee. Applications for lump sum awards are no doubt burdensome to the Board, but constitutional requirements should not be ignored for the sake of short term efficiency. The right to have a hearing

is fundamental to due process because it is fundamental to a visceral level sense of justice and fairness. Those in government should not expect the continued consent of the governed if we violate such basic American notions of fair play.

IT IS HEREBY ORDERED, that the court reverses the award of the State Board of Workers' Compensation dated June 20, 1990, and recommits the case to said Board for a hearing in conformity with the judgement and opinion of the court.

SO ORDERED, this 13th day of September 1990.

/s/
JOHN LEE PARROTT
Judge of Superior Courts
Ocmulgee Judicial Circuit

WC 5519
7/89

STATE BOARD OF WORKERS'
COMPENSATION

Case No 258-68-1142 Case of Ednar James

Injury Date 06-26-84 Date 06/20/90
03-24-85 & 02-05-82

Ednar Louise James 1031 S. Jefferson Street Milledgeville, Georgia 31061	Employee
Central State Hospital Piedmont Hall, M.R. Division Milledgeville, Georgia 31061	Employer/ Self-Insurer
Dept. of Admin. Svcs. P.O. Box 38398 Capitol Hill Station Atlanta, Georgia 30335	Servicing Agent
Subsequent Injury Trust Fund Tow [sic] Northside 75 Suite 124 Atlanta, Georgia 30318	Party In Interest
W.B. Bradley Attorney at Law 201 South Wilkinson St. Milledgeville, Georgia 31061	Counsel for Employee

Sligh, Presmanes & Jackson
Attorneys at Law
1800 Century Place
Suite 360
Atlanta, Georgia 30345

Counsel for Employer

After consideration of the record, the Board finds that payment of a lump sum advance is not in the best interest of the employee.

AWARD

The application made by the employee for a lump sum advance is denied.

IT IS SO ORDERED, this the 20th day of June, 1990.
Concurring: Directors Don L. Knowles and Claude A. Bray, Jr.

STATE BOARD OF WORKERS' COMPENSATION

/s/
JAMES W. OXENDINE, CHAIRMAN

/pag

SUPREME COURT OF GEORGIA

ATLANTA SEPTEMBER 09, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S91A0912

GEORGIA SUBSEQUENT INJURY TRUST FUND ET AL. V. EDNAR LOUISE JAMES

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of

said court affixed the day and year last above written.

Joline B. Williams, Clerk.

COURT OF APPEALS

OF THE STATE OF GEORGIA

ATLANTA, APRIL 2, 1991

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A91A0445. GEORGIA SUBSEQUENT TRUST FUND, et. al. v. JAMES

It appearing that this case involves an appeal in which the constitutionality of a law has been called into question, this case is hereby transferred to the Supreme Court. Ga. Const. 1983, Art. VI, Sec. VI, Par. II (2).

COURT OF APPEALS OF THE

STATE OF GEORGIA

Clerk's Office, Atlanta, APR 2 1991

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/
Victoria McLaughlin,
Clerk

Rule 222. Time limit for application for lump sum payment.

(a) The board will not consider an application for lump sum payment when benefits have been continued for less than 26 weeks and involving less than 26 weekly benefits remaining to be paid, but the employer/insurer may make lump sum payment without commutation of interest and without an award from the board. See Rule 61(b), Form WC25.

(b) In lieu of a hearing, the board will consider application for lump sum advancements and lump sum payments in accordance with the following procedure:

(1) Request for lump sum advancements must be submitted on Form WC25a. Requests for lump sum payments must be submitted on Form WC25. All requests must be accompanied by supporting

affidavits and documents as outlined below:

(A) A showing of need for the advance payment for settlement and the proposed use of the funds requested.

(B) The current physical status of the employee showing the extent and duration of disability, including up-to-date medical ratings.

(C) A proposed method of repayment for an advance payment.

(D) The fee of the attorney for obtaining the advance payment or lump sum payments.

(E) An affidavit containing the following information:

(i) Statement of minimum living expenses, including rent, groceries, utilities, etc.

(ii) Emergency needs required to

prevent undue hardship or irreparable damage to welfare of the family and employee.

(iii) Long-term debts, including mortgage on home, furniture, automobile, etc. List the total amount due, when debt was incurred, to whom owed, the monthly payments and purpose of debt.

(iv) Total income of household from all sources.

(v) Number and age of children.

(2) Copy of application and all supporting affidavits and documents must be served upon the employer/insurer, and any other interested parties, at the time of filing with the board. The parties have 10 days from the date of service to file objections to the application. The following Certificate of Service must

accompany the application:

"This is to certify that I have this date served all interested parties with a copy of the foregoing application with supporting affidavits and documents by depositing a copy in the United States mail properly addressed and with proper postage affixed thereto."

(3) Objections to an application must be accompanied by counter-affidavits and documents in support of the objections and served upon the party or the attorney making the application with the usual Certificate of Service attached.

(4) Upon receipt of an application and after allowing time (10 days from Certificate of Service) for the filing of objections, the board will consider the application and any objections and,

within 30 days of the date of filing the application, issue its award unless, in the judgement of the board, there are material and bona fide disputes of fact. In the event of a material and bona fide dispute of fact, the board may schedule a hearing or assign the case to an administrative law judge for the purpose of receiving evidence.

(5) Any party desiring to cross-examine an adverse party may do so by deposition or written interrogatories within 15 days of receipt of the application. The period for taking depositions or written interrogatories may be extended by the board upon showing of just cause.

6) In cases were the parties agree to a lump sum advance or a lump sum payment, only (1) and (2) of the above procedures are applicable, unless otherwise required

by the board.

Georgia Form WC 25

(White)

APPLICATION FOR LUMP SUM

Soc. Sec. No. 258-68-1142

Case of Ednar James

Employer State of Georgia/Central State Hospital

Insurer self-insured/Dept. of Admin. Svcs., Servicing Agent

Date of Accident 4/5/82, 6/26/84

No. of Dependents 0

Married _____ Single XX

The applicant requests lump sum payment for the following reasons:

The lump sum payment is requested to enable the claimant to pay her monthly living expenses on time, purchase sufficient food, obtain her own home, see doctors and/or dentists when needed and

to enable her to contribute to the expense of her niece's home in which she lives and pay outstanding medical bills. See Exhibit "A", "B", and "C".

/s/_____
EDNAR JAMES, Applicant

Forward to Insurer

Insurer Must Complete Below Line
And Forward to Board

Compensation paid to _____
(not inclusive) Date

		Amount
Paid __	weeks for total disability	$_____
Paid __	weeks for temporary partial disability	_____
Paid __	weeks for permanent partial disability	_____
Paid __	weeks for death benefits	_____
	Total	$_____

The insurer agrees to pay the compensation due in a lump sum, subject to commutation to its present value calculated at the interest rate of 7% per

annum.

_____
Insurer

By _____

Title _____

STATE BOARD OF WORKERS' COMPENSATION

STATE OF GEORGIA

In Re:

Employee: EDNAR JAMES

Employer: STATE OF GEORGIA/CENTRAL STATE HOSPITAL

S.S. No.: 258-68-1142

D/A : 4/5/82, 6/26/84

AFFIDAVIT

To Whom It May Concern:

Ms. Ednar James continues to be totally disabled. I do not expect any improvement in her condition.

This 27th day of November, 1989.

/s/
Dr. Pedro Tamayo

Sworn to and subscribed before me
this 23rd day of November, 1989.

/s/ Terri L. Adams
Notary Public, State of Georgia
My Commission Expires: 08/31/91

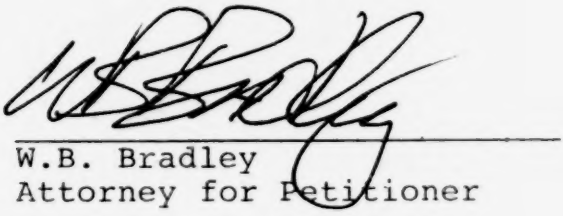
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Georgia upon the individuals listed below, being counsel of record for all other parties, by depositing the same in the United States mails, first-class postage pre-paid, addressed to the following:

Mr. K. Prabhaker Reddy
Attorney at Law
Attorney General's Office
State of Georgia
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Mr. James G. Jackson
Attorney at Law
1800 Century Place
Suite 360
Atlanta, Georgia 30345

This 6th day of December, 1991.



W.B. Bradley
Attorney for Petitioner

201 South Wilkinson Street
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(2)

No. 91-932

Supreme Court, U.S.
FILED
JAN 8 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

EDNAR LOUISE JAMES,

Petitioner,

v.

SUBSEQUENT INJURY TRUST FUND AND CENTRAL STATE HOSPITAL,

Respondents.

Petition For Writ Of Certiorari To The Georgia Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court should grant certiorari to determine if the Petitioner, who is receiving weekly workers' compensation benefits, has a "property right" in a lump sum payment of such benefits.

II. Whether this Court should grant certiorari to determine if the Supreme Court of Georgia properly held that the Petitioner was provided procedural due process by the Georgia State Board of Workers' Compensation.

LIST OF PARTIES

Ednar Louise James – Petitioner

Central State Hospital – Respondent

Georgia Department of Administrative Services – Respondent

Georgia Subsequent Injury Trust Fund – Respondent

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No. 91-932

In The

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EDNAR LOUISE JAMES,

Petitioner,

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SUBSEQUENT INJURY TRUST FUND AND CENTRAL STATE HOSPITAL,

Respondents.

Petition For Writ Of Certiorari To The Georgia Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents in the above-styled action respectfully oppose the Petition for Writ of Certiorari to the Supreme Court of Georgia. The question presented by Petitioner for review does not meet any of the considerations outlined in Supreme Court Rule 10 governing review on certiorari. Accordingly, Respondents request that the Petition be denied.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Georgia is officially reported at 261 Ga. 548 (1991), and is unofficially reported at 406 S.E.2d 77 (Ga. 1991). In addition, the text of the opinion is included as Exhibit A in the Petitioner's Appendix to Petition for Writ of Certiorari.

JURISDICTION

Respondents concur in the Petitioner's Statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Constitutional provision at issue in this case is the Fifth Amendment to the United States Constitution; the statutory provision at issue is O.C.G.A. § 34-9-222(a). The text of O.C.G.A. § 34-9-222(a) is included on pages 3-4 of the Petitioner's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner, Ednar Louise James, is presently receiving weekly workers' compensation benefits as a result of an injury she received during her employment with Respondent Central State Hospital. In January of 1990, and pursuant to O.C.G.A. § 34-9-222(a), Petitioner filed an application for a lump sum settlement of these benefits. Respondents, Central State Hospital and the Georgia

Department of Administrative Services, objected to this application for a lump sum award. Respondent Georgia Subsequent Injury Trust Fund became a party to this matter because the Co-Respondents have an accepted claim for reimbursement filed with Respondent Georgia Subsequent Injury Trust Fund, which would be affected in the event the application for a lump sum award was granted.

In February and April of 1990, Petitioner requested a hearing before the State Board of Workers' Compensation regarding her application for a lump sum award. On July 6, 1990, the State Board of Workers' Compensation denied Petitioner's application for a lump sum award based on Board Rule 222. Board Rule 222 provided Petitioner a "paper hearing" by allowing her to support her claim by submitting to the Board affidavits, depositions and sworn documentation. Petitioner then appealed to the Superior Court of Baldwin County, which reversed the Board's decision holding that due process entitled the Petitioner to a hearing on the issue of the lump sum award. Respondents appealed the Superior Court's reversal to the Georgia Court of Appeals. Because a constitutional issue was involved, the Georgia Court of Appeals transferred the case to the Georgia Supreme Court. The Georgia Supreme Court, in a decision dated July 3, 1991, held that the Petitioner was provided procedural due process. The Georgia Supreme Court denied Petitioner's Motion for Rehearing on September 9, 1991. Petitioner thereafter filed the instant Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

This petition arose as a result of Petitioner's contention that she is entitled to an oral hearing on her application for a lump sum award of workers' compensation benefits. Having failed to persuade the Supreme Court of Georgia that the procedures provided by the State Board of Workers' Compensation denied her due process, Petitioner now has filed this appeal. In setting forth its argument to this Court, Petitioner contends that the lack of an oral hearing denied her procedural due process. However, this Court has held that procedural due process does not always require an oral hearing. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Dixon v. Love*, 431 U.S. 105 (1977). Thus, the Georgia Supreme Court correctly relied on *Mathews v. Eldridge*, holding that due process does not always require an oral hearing, and that there were no constitutional infirmities in the procedures provided to the Petitioner. In addition, although the Georgia Supreme Court assumed without deciding that the Petitioner has a property interest in a lump sum award, Respondents submit that the Petitioner does not have such a property interest. Therefore, the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE PETITIONER DOES NOT HAVE A PROPERTY INTEREST IN A LUMP SUM AWARD, AND THEREFORE NO SPECIFIC PROCESS IS DUE.

The Petitioner filed an application for a lump sum payment of her workers' compensation benefits. Since

Petitioner has previously been determined to be entitled to workers' compensation benefits, she is currently receiving her weekly benefits. Thus, the Petitioner's entitlement to weekly benefits is not in dispute; rather, only her application for a discretionary lump sum payment is at issue. This application simply seeks more than what the Petitioner is entitled to under Georgia law. Consequently, the Petitioner is not being deprived of a constitutionally protected property right, and procedural due process is not required.

The threshold question in procedural due process cases is whether a "liberty or property interest" is at stake. *Board of Regents v. Roth*, 408 U.S. 564 (1972). If Petitioner does not have a property right or interest in a lump sum award, then there are no due process implications.

The existence of property interests are determined by reference to state law. *Roth*, 408 U.S. at 561. Official Code of Georgia Annotated § 34-9-222(a) allows an employee to file an application with the Board for a lump sum settlement or advance. The Board **"may"** order a lump sum payment. *Id.* The Georgia Court of Appeals, in interpreting this Code section, has held that there is no requirement that a hearing be held because the determination regarding lump sum awards is within the **discretion** of the Board. *Johnson v. Atlanta Dairies Coop.*, 172 Ga. App. 403, 404, 323 S.E.2d 185, 186 (1984). Consequently, contrary to the Petitioner's contention, Georgia law does not require that a hearing be provided since no property interest exists in lump sum awards. So long as the Board's decision is supported by competent evidence, the

Board has the legal **discretion** to determine the entitlement to lump sum awards. *International Energy Structures v. Fennelly,* 187 Ga. App. 416, 417, 370 S.E.2d 523, 524 (1988). Thus, if the Board is vested with **discretion** to grant or deny lump sum payments, then Petitioner cannot have a property right in a lump sum payment. Therefore, this case does not warrant further review by this Court since the Petitioner has no property right to a lump sum award.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER THE PETITIONER WAS DENIED PROCEDURAL DUE PROCESS WHERE THE GEORGIA SUPREME COURT CORRECTLY HELD THAT A "PAPER HEARING" WAS SUFFICIENT.

Assuming arguendo that the Petitioner has a property right to a lump sum award, the Petitioner was provided due process because she was given a fair opportunity to present her arguments to the Board of Workers' Compensation pursuant to Rule 222 of the Rules and Regulations of the State Board of Workers' Compensation. This Rule allowed the Petitioner to file with the Board any depositions, affidavits or verified documentation she believed was necessary to support her claim. *See* Board Rule 222(b). The procedures provided by the Board pursuant to Board Rule 222 are sufficient to pass muster under the minimum constitutional standards which due process requires in the administrative setting. *Dixon v. Love,* 431 U.S. 105 (1977). Furthermore, "due process is flexible and calls for [only] such procedural protections as a particular situation demands." *Morrissey v. Brewer,*

408 U.S. 471, 481 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976).

The procedures set out in Board Rule 222 satisfy the minimum due process requirements under the *Mathews v. Eldridge* balancing test. This balancing test considers three factors: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation and the value of additional safeguards; and (3) the governmental interest at stake, including the physical and administrative burden. *Mathews*, 424 U.S. at 335.

In the case *sub judice*, the private interest at stake is not the determination of benefits needed for daily sustenance, but rather Petitioner's interest in a lump sum award of approximately $93,044.24, instead of her normal weekly payments. Thus, the private interest is not as grave as in the *Mathews'* case where benefits were terminated. In addition, the risk of an erroneous deprivation occurring is minimal since the Board examines affidavits and verified documents submitted by the parties. *See* Board Rule 222(b)(1, 5) *and International Energy Structures v. Fennelly*, 187 Ga. App. at 417, 370 S.E.2d at 524. Also, an oral hearing would have little value since both parties can respond and cross examine adverse parties by deposition. *See* Board Rule 222(b)(6). Finally, if the Board was required to provide a hearing on every application for a lump sum payment, the administrative and fiscal burden on the Board would be tremendous due to the large number of applications that are filed. Thus, the Board has a substantial interest in not providing oral hearings on all applications for lump sum payments.

Based on the above, the Georgia Supreme Court properly applied the *Mathews'* balancing test in determining that Petitioner was provided sufficient procedural due process. Accordingly, this Petition should be denied.

CONCLUSION

The issues presented by this case involve constitutional questions that have been well settled by this Court. Accordingly, and based on the arguments presented herein, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(Counsel of Record)

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